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COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ENRIQUE AGUILAR,

Defendant and Appellant.

E029368

(Super.Ct.No. ICR 24809)

O P I N I O N

APPEAL from the Superior Court of Riverside County. H. Morgan Dougherty,
Judge. Affirmed.

Martin Nebrida Buchanan, under appointment by the Court of Appeal, for Defendant
and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, James D. Dutton, Supervising
Deputy Attorney General, and Matthew Mulford, Deputy Attorney General, for Plaintiff and
Respondent

In *People v. Aguilar* (E025382, nonpub. opn. filed 6/19/00) we affirmed defendant
Aguilar's convictions of four counts of residential burglary. However, we remanded the

case for an evidentiary hearing on the validity of one of the prior conviction allegations. On remand, the trial court held the evidentiary hearing and found that the prior conviction allegation was valid. Accordingly, it denied defendant's motion to strike the prior conviction allegation, leaving the previously imposed sentence intact. Defendant again appeals.

DISCUSSION

In *People v. Allen* (1999) 21 Cal.4th 424, our Supreme Court reaffirmed the holding of *People v. Sumstine* (1984) 36 Cal.3d 909 that "a criminal defendant, charged with having suffered a prior felony conviction, may move in the trial court to strike the alleged prior conviction on the ground the trial court in the prior proceeding failed to observe the defendant's *Boykin-Tahl* rights. (*Boykin v. Alabama* (1969) 395 U.S. 238 . . . ; *In re Tahl* (1969) 1 Cal.3d 122 . . .)" (*People v. Allen, supra*, 21 Cal.4th 424, 426-427.)

The *Allen* court explained that a hearing must be held in response to a defendant's *Sumstine* motion: "[W]hen responding to a *Sumstine* motion, the trial court is specifically required to hold a hearing and take evidence on the voluntariness of the prior plea. Neither the defendant nor the prosecutor is limited to the face of the record in the prior proceeding, but may offer any evidence germane to the defendant's contention he was unaware of his rights when he pleaded in the prior proceeding. . . . Thus, *Sumstine* anticipates that, in hearing a motion to strike, the trial court will examine the totality of the circumstances to determine the voluntariness and intelligence of the plea, much as the court would do if it were presiding over a hearing held in response to a petition for a writ of habeas corpus." (*People v. Allen, supra*, 21 Cal.4th 424, 439-440.)

Specifically, our Supreme Court found that, although a *Sumstine* hearing “may, in some cases, involve a full-blown trial of contested facts, we reasoned in *Sumstine* that such wide-ranging inquiries should largely be avoided by the rule that *Boykin-Tahl* waivers be placed on the record to facilitate future review. [Citation.]” (*People v. Allen, supra*, 21 Cal.4th 424, 441.) The court also noted that “the record of the hearing in which the trial court accepted the defendant’s plea should clearly demonstrate the defendant was told of his rights and that he affirmatively waived them. Thus, permitting defendants to raise a *Boykin-Tahl* claim in a motion to strike at trial would entail little disruption; a quick review of the transcript of the sentencing hearing may be all that is necessary.” (*Id.* at p. 442.)

In this case, two prior burglary conviction allegations were found to be true within the meaning of Penal Code section 667, subdivision (a) and the “Three Strikes” law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subd. (c)). One of the prior burglary convictions (case No. ICR 16689) was supported by a statement in the clerk’s minutes that defendant was advised of his “constitutional rights” and waived them.

Although the trial court found the prior conviction to be true, it denied defendant a pretrial evidentiary hearing on the validity of the prior burglary conviction in case No. ICR 16689. We found that the trial court erred in its ruling, and the error was prejudicial because the record of that conviction did not show a proper advisement and waiver. Our record only showed the statement in the clerk’s minutes. We found that statement to be an inadequate basis for the trial court’s conclusion. We therefore remanded for a full evidentiary hearing.

On remand, the trial court relied on the transcript of the hearing on June 18, 1993, and points and authorities on file. Although the trial court did not specifically offer defendant the opportunity to present additional evidence, defendant did not attempt to do so. Instead, he argued that the hearing transcript showed that defendant never expressly waived his constitutional rights. He reiterates the argument on this appeal.

As noted above, the transcript of the June 18, 1993 hearing was not previously before us. It reveals that the following colloquy took place: “[The Court]: Now you understand that this is a felony; that you have certain Constitutional Rights: [¶] You have a right to a speedy trial by court or by jury. [¶] You have a right to confront and cross-examine the witnesses to be called against you. [¶] You have a right to call witnesses on your own behalf at no cost to yourself. [¶] And you have a right to remain silent. [¶] Do you understand all of these rights? [¶] [Defendant]: Yes. [¶] [The Court]: Do you have any questions about any of the rights I just stated to you? [¶] [Defendant]: No, that’s fine. [¶] [The Court]: Do you understand that in order to plead guilty to Count I pursuant to *People v. West*, you have to waive and give up all the rights I just stated to you? [¶] Do you understand this? [¶] [Defendant]: Yes. [¶] [The Court]: Is that what you want to do, is give up and waive all the rights I’ve just stated to you so you could plead guilty to Count I pursuant to *People v. West*? [¶] [Defendant]: Yes.”

Defendant contended in the trial court that this colloquy does not show that he knowingly and intelligently waived his constitutional rights. That is, although defendant was asked if he understood that he had to waive these rights in order to plead guilty, he claimed that he was never actually asked if he did waive his rights. On appeal, he contends that he

did not expressly waive his constitutional rights and his guilty plea should be invalidated under the totality of the circumstances test.

The trial court rejected the argument that asking defendant what he wanted to do was different than asking him if he waived his rights. It found an implied waiver of rights from the record of the June 18, 1993 hearing.

While we agree with the trial court's conclusion, our reasoning is slightly different. First, we find sufficient grounds to find an express waiver: "[The Court]: Is that what you want to do, is give up and waive all the rights I've just stated to you so you could plead guilty to Count I pursuant to *People v. West*? [¶] [Defendant]: Yes."

Second, the trial court failed to apply the totality of the circumstances test. Under that test, the trial court must examine the totality of the circumstances to determine the voluntariness and intelligence of the plea. (*People v. Allen, supra*, 21 Cal.4th 424, 440; *People v. Howard* (1992) 1 Cal.4th 1132, 1178.) But even though the trial court did not mention the totality of the circumstances, the hearing transcript was the only evidence of the circumstances of the guilty plea and, in the absence of other evidence, it was sufficient to establish those circumstances. In other words, the trial court was correct in finding an implied waiver under the totality of the circumstances: "The record here . . . demonstrates that the absence of an express admonition and waiver concerning the privilege against self-incrimination did not render the plea any less voluntary and intelligent. The trial judge clearly advised defendant of his right to a jury trial and to confront the evidence against him, that the state had the burden of proving him guilty beyond a reasonable doubt, and that he could *remain silent* and the burden of proof would not shift to him. Thus, defendant was

effectively apprised of the privilege against self-incrimination. Moreover, defendant indicated that he understood and freely waived these rights. Under the circumstances, we are satisfied that defendant's plea was voluntary and intelligent. [Citation.]" (*People v. Wash* (1993) 6 Cal.4th 215, 269.) Thus, although express waivers are generally required, specific words are not, and the totality of the circumstances test may excuse minor deviations when defendant's knowledge of his rights, and his intent to waive them, is otherwise established. (*People v. Howard, supra*, 1 Cal.4th 1132, 1178-1180.)

Third, defendant did not show the invalidity of the prior conviction by a preponderance of the evidence: "Once this prima facie showing [that defendant suffered the prior conviction] has been made, the defendant has the burden of producing evidence to establish the constitutional invalidity of the prior conviction, and the burden of proof on such issue shall remain with the defendant. The People have the further right to present evidence in rebuttal. [Citations.] At the conclusion of the hearing, the trial court must determine whether the defendant has carried his burden of establishing the constitutional invalidity of the prior conviction by a preponderance of the evidence. [Citation.]" (*Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1307.) There were ample grounds here for the trial court to conclude that there had been a sufficient waiver by defendant.

Fourth, defendant did not offer any testimony. In the prior appeal, counsel argued that, if a hearing had been held on his pretrial motion, defendant "could have introduced evidence that he was not actually aware of his rights when he pled guilty, or that he waived his rights and pled guilty involuntarily." But having been given his opportunity, defendant failed to introduce any such evidence, and chose to rely on the transcript which shows a

proper advisement and waiver. “To collaterally attack a judgment of conviction on *Boykin-Tahl* grounds, it is not enough to show an incomplete or otherwise defective advisement; defendants must also allege and prove that, when the plea was entered, they lacked knowledge of, or did not intelligently waive, their constitutional rights. [Citations.]” (*People v. Hayes* (1990) 52 Cal.3d 577, 637.) Defendant failed to meet this burden of proof, and the trial court properly found he waived his constitutional rights when he pled guilty in case No. ICR 16689.

DISPOSITION

The order of April 6, 2001 is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

McKINSTER

J.

GAUT

J.